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OPINION

Technology as an Imperative for Regulating Copyright: From the Public Exploitation to the Private Use of the Work

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It is often said that regulation of the internet should aim at being technology-neutral. This idea was regularly heard in the copyright arena. However, one cannot doubt that this technology-neutrality is anything but a false pretence when it comes to the recent changes in copyright law. Two examples, the temporary reproduction and the legal protection of technological measures, underline the perverted role of technology in dictating what copyright should look like. This opinion aims at explaining how this has happened and to what extent this "technological mandate" has brought about a radical shift of the copyright regime.

Copyright as a legal tool to regulate the public exploitation of artistic works

Copyright has always been a "doctrine of public places"[1] in the sense that the very objective and justification of copyright is to enable the author or copyright owner to control the transmission of his or her work to the public, whether by means of reproduction and distribution of copies to the public or by communication of the work to the public. This basic rule of copyright is rooted in the philosophical and economic grounds of granting an exclusive right to creators. As a consequence, many provisions of copyright revolve around the notion of the public. Private acts of use, such as communication within the family circle, are excluded from the scope of copyright. Definitions of the exclusive rights require the element of a public: for instance, a copy is deemed to be a reproduction when a material fixation of a work enables the perception of the work or, as in the French definition of the reproduction right, its communication to the public in an indirect manner.

The natural scope of copyright is thus to control the public diffusion of the work to a public, taken as a whole.[2] One can translate this idea by saying that the centre of attention for copyright is the *exploitation* of a work, where exploitation is defined as public diffusion. Copyright has never been about regulating *access* to or *use* of works. Access to works is made possible and regulated either by the property right in the original embodiment of the work, or by entering into a contract with a distributor to get a material copy of the work. This key distinction between exploitation and access/use simply resulted from the key principle of the separation of the intellectual object, the work, and the material object embodying it. This is currently changing, however.

The case of the temporary copy and the new technical definition of reproduction

When copyright was chosen as the means to protect computer programs, the worm started eating the fruit. It was felt necessary to prevent uses of software by multiple users from one single copy hosted on a shared server. In the European Union, the solution that was then found was to include in the reproduction right any temporary fixation of a computer program. Therefore any copy made in the RAM of the computers technically needed to use the software was considered as an infringement of the reproduction right. Only an exception exempting acts of normal use of the software limits this new scope of copyright.

1 P. Goldstein, *Copyright's Highway. From Gutenberg to the Celestial Jukebox* (New York, 1994), p.201.

2 This argument is more thoroughly addressed in S. Dusollier, *Droit d'auteur et protection des œuvres dans l'univers numérique—Droits et exceptions à la lumière des dispositifs de verrouillage des oeuvres* (Larcier, Bruxelles, 2005), nos 419 *et seq.*

The same construction (broad right defined by a technical fact only limited by a conditional exception) has since been adopted for any types of works, hence becoming an overall rule of the EU copyright framework.

Defining the right of reproduction by a technical occurrence, (*i.e.* an act of fixation) departs from the traditional *legal* definition of that right: the reproduction of a work implies the exclusive right of the author if it is a fixation (*technical* criterion) enabling the perception of the work to the public (*legal* criterion). Technical fixation alone does not suffice.

By protecting any act of technical fixation, it is the mere use of the work that is protected. That prerogative of the rightholder should not be included in his or her copyright, but arises only from the licence contract that is signed with users of the work. A confusion between the natural scope of copyright, as a right protecting the intellectual property, and the subsidiary role of contract and/or property rules as the normal framework to protect the distribution of copies of the work is hence added to the conceptual mistake in the legal notion of the reproduction right.[3]

Besides, leaving out the mere use of a copyrighted work through a rule of exception to an exclusive right is not really legally secure. An exception is subjected to a strict interpretation, can be contracted out in many countries and can be limited by the application of the three-step test. It would have been legally sounder to limit the right of the copyright owner not by an exception but by a proper definition of his or her exclusive right of reproduction, leaving the mere use of the work beyond the scope of the copyright monopoly.

The case of DRM and the new technical definition of the extent and limits of copyright

Such confusion between intellectual work and material object, similarly resulting from a technological imperative, also appears in relation to technological measures and the way copyright has protected them. As a brief reminder, different types of technological measures ("TM"), based on cryptography or other technical means, have been developed in the last few years to address the thorny issue of protecting and managing IPR in a digital environment. Such TM are commonly referred to as DRM (digital rights management). As soon as technology has been envisaged to enhance an effective exercise of copyright, it has been feared that similar technology might be used to defeat the technical protection. Building a technical fence around works was not considered sufficient. It was felt that legal protection of such technical protection was needed too. In other words, the fence had to be electrified: acts of disabling the technical barrier had to be punished.

The WIPO Treaties of 1996 enacted such protection and were followed by many countries, such as the United States or the Member States of the European Union. The relevant pieces of legislation in those countries, known as anti-circumvention provisions, prohibit the act of circumvention itself of the TM and so-called preparatory activities, *i.e.* any act of distribution and manufacture of devices enabling or facilitating the circumvention.

The anti-circumvention provisions are the most interesting battlefield between the traditional vision of the copyright law and the dictates of technology. Here again, the latter won. The scope of copyright is no longer decided according to what the proper scope should be, but according to what the technology can do.

On one hand, the definition of the TM systematically refers not to the exclusive rights of the copyright owner but to what the copyright owner is able to protect through technology. In the Digital Millennium Copyright Act, *i.e.* the US Act that protects TM, a TM is protected against circumvention if it controls the rights of the copyright owner or if it controls access to the works. As to the latter, the case law has construed the notion of TM controlling access so broadly that it basically covers any technology under the sun.[4] If, by using the work, one is in one way or another faced with the operation of a TM, even without noticing it, that TM is, under this case law, a TM controlling the access to the work. The mere existence of a TM makes it a TM protected against circumvention!

3 Dusollier, *ibid.*, nos 477 *et seq.*

4 See, *e.g. Universal City Studios, Inc v Shawn C. Reimerdes* 111 F. Supp. 2d 294 (S.D. N.Y. 2000) *conf'd*, 273 F. 3d 429 (2d Cir. 2001); *United States of America v Elcom Ltd & Dmitry Sklyarov* 203 F. Supp. 2d 1111 (N.D. Cal. 2002); *Lexmark Int'l v Static Control Components, Inc* 2003 U.S. Dist. LEXIS 3734 (E.D. Ky 2003); *321 Studios v Metro Goldwyn Mayer Studios, Inc* No.C 02-1955 SI (N.D. Cal. 2004).

It is the same in the European Union where the TM is protected by the EU Directive of 2001 on copyright in the information society, as soon as it protects an "act non authorized by the right holder".[5] One could not dream of a better tautology: obviously, since the rightholder has decided to technically protect an act of use related to his or her work, it means that he or she was willing not to authorise such an act. Any TM is then addressed by the EU anti-circumvention protection.

In the United States and the EU, the technological capacity dictates the legal scope of protection. Any use of a work enters, through the legal prohibition of the circumvention of a TM, into the arena of control granted to copyright holders.

This brand-new scope of copyright protection is not even limited by any limitations, exceptions or fair use provisions. Both the DMCA and the EU 2001 Copyright Directive state that the TM prevails over the exercise of fair use or exceptions to copyright.[6] The legitimacy, under copyright law, of making a private copy, a parody, a criticism or an educational or research use does not matter as soon as a technical mechanism is able to inhibit such use or copy of the work. Such exceptions excuse neither an act of circumvention nor an act of trafficking in circumvention devices. Armed with TM and anti-circumvention laws, the rightholder is now entitled to prevent the users from making fair use of copyrighted works. That clearly results from the EU Directive and from the US DMCA. Both texts provide for some safeguarding provisions, but those are rather limited and insufficient. The US legislation only lays down a list of very restricted and ill-founded exceptions to the circumvention prohibition[7] and entrusts an administrative body with the evaluation of the "adverse effect on fair use" that the application of the anti-circumvention provision might have.[8] The EU Directive imposes on Member States the duty to find solutions so that the legitimate user of a work is able to benefit from some exceptions, albeit the presence of a TM.[9] But this solution is limited to some exceptions and largely leaves room to the intervention of the copyright holders themselves. If they propose anything to address those exceptions, the lawmaker is no longer obliged to rule on the matter.

Copyright owners are thus granted some legitimacy in controlling, through technology, acts of use traditionally exempted by copyright law. Here also, what technology can do becomes what the extent of copyright should be. The social and public justifications for permitting some uses of copyrighted works stand aside to let the technology deploy its whole capacity. TM are becoming substitutes for copyright even though they are still broadly advertised as mere complements to it. The WIPO Treaties only concerned TM that prevent uses covered by copyright and gave immunity to copyright exceptions and limitations. Conversely, the EU and US anti-circumvention provisions address any use that technology can encapsulate and consider exceptions and fair use as nothing but failures of the copyright body that technology can heal.

The shift of the copyright regime to the control of access to and use of the work by individuals

The legal treatment of the temporary copy and the extension of the scope of copyright through technological measures and anti-circumvention provisions are only symptoms of a more insidious illness contaminating copyright in favour of the digital environment. Regulating the simple use of the works, or the access to the works, by TM, anti-circumvention laws and temporary reproduction rights enable the regulation of the distribution of the work to any individual. From the exploitation of the work, its diffusion to the public as a whole, the copyright has shifted to the control of the business model, aided by technology, of the distribution of copyrighted works to individuals. This was the main goal of some copyright owners.

This move has distorted the copyright law to an extent that we are only beginning to experience and understand. The technology that helps achieve it was both the pretext and the means to accomplish that shift of copyright.

How we should address this substitution of the foundations and principles of copyright by rules imposed by mere technical facts is one of the key

5 Art.6 §3 of Directive 2001/29 on copyright and related rights in the information society, of May 22, 2001.

6 As it results, for the DCMA at least for TM controlling access to works, from case law (*Universal City Studios, Inc v Eric Corley* 273 F. 3d 429, 459 (2d Cir. 2001); *United States of America v Elcom Ltd*, n.4 above, at [19]; *321 Studios v Metro Goldwyn Mayer* Studios, n.4 above; and, for the EU Copyright Directive, from the definition of the protected TM and from the need of a safeguarding mechanism for some exceptions as laid down in its Art.6 §4.

7 17 U.S.C. §1201(d)–(j).

8 17 U.S.C. §1201(a)(C). Two evaluations have already taken place; see Copyright Office, "Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies", October 27, 2000, Library of Congress; *Federal Register*, Vol.65, October 31, 2000, Rules and regulations, p. 64556; *ibid.*, October 28, 2003, Library of Congress, Federal Register, vol.68, October 31, 2003, Rules and Regulations, p.62011.

9 Art.6 §4 of the Copyright Directive of 2001.

questions in copyright today. Failing to give an adequate and balanced answer to it would be stealing copyright from the public and giving it to the industry. The public is becoming more and more contemptuous of copyright. This leads to an increasing tendency to infringe copyright. P. Goldstein once said that one great virtue of copyright is its balance, "one that weighs authors' interests against the need for public access. This balance has withstood, and been shaped by, the test of time and, however incompletely, has won civil obedience through the reasonableness of its command".[10]

By putting technology on the throne of copyright to achieve a more fine-grained control of the use of the work by individuals, one can only engender greater civil disobedience. Technology as a tool to help copyright in the digital age would then finally be the end of copyright.

Thwarting this evolution should rest on a proper understanding of the very nature of technology and the way it interacts with law. By its very nature, technology is prosthetic: it creates a shortfall and substitutes for that failure rather that completing it. For instance, the typewriter was originally invented to enable the blind to write, to access a mechanical writing technique.[11] Finally used by everybody, the typewriter has changed the way we write and communicate. When using such a machine, one has to unlearn the vision of the touch and appropriate a sort of blindness. Technology was created to remedy a deficiency but, in order to operate fully, it created in itself a similar deficiency. The use of technology in copyright is alike. It is a solution to a lack of an effective protection of copyright. However, in order to deploy its full operation and power, it has to create an absence of copyright or at least a dissimulation of copyright behind the dictates of technology. Restoring the law in copyright, going back to its source principles, is the only solution to keep a fair balance in intellectual property and to use technology as an adequate tool and aid. The application of a technology-aided paradigm of copyright is about managing the relationship between technology and copyright law, not about replacing one by another. However, this is not the path that current copyright lawmakers have decided to follow.

10 P. Goldstein, "Copyright and Its Substitutes" [1997] Wis. L. Rev. 870.
11 The analogy is taken from B. Preciado, *Le Manifeste Contra-Sexuel*, 2000.

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